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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-218287 **DATE:** May 30, 1985

MATTER OF: Stellar Industries, Inc.

DIGEST:

In a total small business set-aside procurement, a bidder's certification of itself as a manufacturer of the supplies to be furnished creates a binding obligation to furnish supplies manufactured or produced by a domestic small business concern, provided the bidder is in fact a small business concern.

Stellar Industries, Inc. protests the rejection of its bid submitted in response to Defense Logistics Agency (DLA) invitation for bids (IFB) No. DLA13H-85-B-8145, a total small business set-aside procurement for icing mixes. The protest is sustained.

Stellar certified in its bid that it was not a small business and left blank the certification that all supplies provided under the contract would be manufactured by a domestic small business. However, it did certify that it was a manufacturer of the supplies offered and, in the "Place of Performance" clause, listed two locations, one for blending all items and one for packing all items. Both showed Stellar as the owner/operator of the plants and both showed that Stellar's "business size status" was small.

DLA concedes that, although the protester checked the blank indicating that it was not a small business, Stellar established itself as a small business concern and as the intended manufacturer of the desired supplies and that both locations listed in the Place of Performance clause are Stellar's. However, the Agency found Stellar non-responsive for failure to certify its intent that all of the supplies to be furnished would be manufactured or produced by a small business concern. The DLA states that, had this certification been completed, Stellar would have been the low, responsive bidder in line for award of

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the total contract. The DLA split this award into two partial contracts (to Continental Mills, Inc. and to Halben Food Manufacturing Co., Inc.).

Stellar maintains that it is clear from the Place of Performance clause not only that it is a small business concern but that all supplies furnished under this contract would come from its plants, i.e., from a small business concern.

The Agency argues that the Place of Performance clause allows Stellar to provide supplies from a large business because it does not require that all work be performed at the listed locations without prior written consent of the contracting officer to a change, and, therefore, that it does not give rise to a binding, enforceable promise to furnish supplies of only small business concerns. In taking this position, DLA relies on Mechanical Mirror Works, B-210750.2, Oct. 20, 1983, 83-2 CPD ¶ 467. We find no support in Mechanical for DLA's position.

First, we note that DLA agrees that Stellar's incorrect certification of itself as a large business would not itself require rejection of the bid as non-responsive because the accuracy of that certification can be verified outside of the bid any time prior to award. See Automatics Limited, B-214997, Nov. 15, 1984, 84-2 CPD ¶ 535.

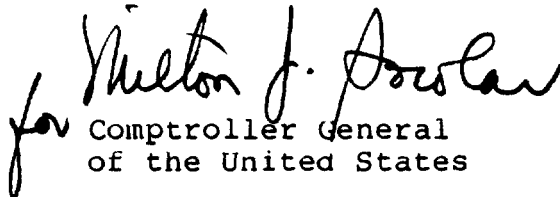
Second, Stellar's certification of itself as a manufacturer of the goods being procured is sufficient to show that firm's intent to furnish supplies that it manufactures. See Automatics Limited, supra; Jack Young Associates, Inc., B-195531, Sept. 20, 1979 79-2 CPD ¶ 207. The certification implements the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35-45 (1982). The Act, with certain limited exceptions inapplicable here, permits the award of contracts for materials, supplies, articles or equipment to be made only to the manufacturer of or a regular dealer in the items to be furnished under the contract. The Act also requires bidders to represent or stipulate that they are either the manufacturer or a regular dealer. A manufacturer is defined in the Federal Acquisition Regulation, 48 C.F.R. § 22.601 (1984), as a person "that owns, operates or maintains a factory . . . that produces on the premises the materials . . . required

under the contract." It follows, then, that by certifying itself as a manufacturer of the supplies required for the purpose of Walsh-Healey, Stellar has committed itself to manufacture those supplies.

In Mechanical, the bidder failed to certify whether it was a small business, whether the supplies furnished would be those of a small business concern, and whether it was a regular dealer or a manufacturer of the goods offered. It also failed to provide the name and location of the producing plant. We held that the bidder did not establish its intention to furnish goods manufactured or produced only by small business concerns. This case also indicated that the requisite binding obligation to furnish supplies manufactured by a small business is met either through certification of the bidder as a manufacturer of the supplies or by certifying that the supplies would be manufactured by a small business.

It is clear from Stellar's bid that it is a manufacturer of the goods to be supplied and that its plants alone will be the places of performance. If Stellar is, in fact, a small business, the requisite demonstration of intent to furnish only goods manufactured or produced by a small business concern has been established.

Accordingly, we sustain the protest. If Stellar is small, we recommend termination for convenience of the two awarded contracts as to all deliveries not yet made and that award as to the balance of the required supplies be made to Stellar.


for Comptroller General
of the United States